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In The

Supreme Court of the United States

October Term, 1974

No. 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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This brief is filed pursuant to paragraph 4 of Rule 24 of this Court because Paynter raises new arguments not heretofore presented (Opposition Brief, pp. 2-3, 7) and because also of repeated misrepresentation of the evidence (pp. 3-6, 13-16).

THE RULING ON THE MOTION TO DISMISS

The Brief in Opposition (p. 3) states: "The District Court made a specific factual finding that Paynter did not have knowledge of his injury until March 20, 1964."

The record is as follows (J.A. 44-45):

> "The court also notes that plaintiff testified that although he was injured on March 19, 1968, he had no knowledge of his injury until March 20. Under FELA, a cause of action only occurs when the plaintiff has reason to know he is injured. * * *
>
> "The court notes that until the plaintiff knew that he was injured, he was legally ignorant of the existence of his alleged cause of action. Therefore, it may be said that the cause of action accrued on March 20, 1968, when the plaintiff first discovered his injury."

That conclusion of Judge Dalton on June 15, 1973 (J.A. 39-47) was based on the deposition of Paynter, taken September 25, 1972 (J.A. 21-22), the original complaint, par. 5, March 22, 1971 (J.A. 4),[1] paragraph 4 of the amended complaint of December 16, 1971 (J.A. 11),[2] and paragraph 4 of the second amended complaint of July 25, 1972 (J.A. 14)[3]

Paynter's answer to interrogatory 24, propounded to him on April 6, 1971 (J.A. 8, 10) and not answered until November 23, 1973 (J.A. 47, 49) was as follows:

> "24. Plaintiff first knew he was injured when treatment was first prescribed consisting of heat treatment on or about April 2, 1968."

At the trial before Judge Turk, however, when proof of the injury became most important to him, Paynter's testimony was directly contrary—that he had immediate knowl-

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[1] "5. That the plaintiff was not immediately aware that he had sustained an injury and continued with his work at that time."

[2] "* * *, and it was not until on or after March 22, 1968, that he knew he had sustained an injury on the occasion of March 19, 1968; * * *."

[3] "* * *, and it was not until after said date that he knew he had sustained an injury on the occasion of March 19, 1968; * * *."

edge of the alleged accident that occurred about 1 p.m. on March 19, 1968 (J.A. 162-163):

> "Along that evening about 2:30 I waited on a couple of cars down at the steel house and I stepped up to the door to step up to the steel house and the pain hit me again in the back and I just thought 'I hurt myself on that switch.' And Russell and John was on the other side of the track over there, and I said 'I hurt my back when I throwed that switch up yonder.' * * *
>
> "Anyway, I went on and we finished the day out ['til 3:00] and I went on home. I walked up on the hill, * * * and I just said, 'I know daggone well I hurt my back.' * * * I couldn't hardly sit down in the swing. * * *"

McCoy, a member of Paynter's crew, testified that Paynter told them right there that day that "he hurt his back when he throwed that number one switch" (J.A. 121).

Had Paynter so testified for Judge Dalton no issue would have been possible for him as to when the cause of action, if any, accrued and there would have been no opportunity then to argue, as there is no factual basis for doing so now, "that Paynter did not have knowledge of his injury until March 20, 1968" (Brief in Opposition, p. 3).

Similar disregard for fact permeates the Brief in Opposition in the same manner as was the situation during the trial, the understanding and control of which we again point out as indispensable to the fair trial required by due process.

RULE 6(a), FEDERAL RULES OF CIVIL PROCEDURE

The opinion of Justice Douglas in *Union National Bank v. Lamb*, 337 U.S. 38, 93 L.Ed. 1190, 69 S.Ct. 911 (1949) recognizes "the considerations of liberality and leniency" finding expression in Rule 6(a). Neither that opinion nor most of the Court of Appeals cited by Paynter expressly

consider the distinction between those procedural acts done before and those done "after the commencement of action" made by the Second Circuit in *Joint Council, etc. v. Delaware, L. & W. R. Co.*, 157 F.2d 417, 420 (1946).

The mere "concurrence of Congress" in the rule as a procedural regulation does not, we submit, express definite approval by the Congress of its application to acts done prior to the original initiation of the proceeding. On that specific point we urge decision.

THE MATERIAL INACCURACIES REGARDING THE EVIDENCE

R. A. Wilson could not have had knowledge to *indicate* "that switch number one and two was not working properly on March 19th, 1968 (150)," as stated at page 5 of the Brief in Opposition, because *Wilson did not work that day* (J.A. 152, 148):

> "Q. And you don't know what condition that switch was in on March 19th around one o'clock do you? A. I didn't work. I was swinging on Tuesday."

And Wilson also testified on direct examination, as did the other five trainmen called by Paynter, as follows (J.A. 149):

> "Q. Have you had occasion to use that same switch when it was cleaned and oiled properly? A. Yes sir.
>
> "Q. And how did it operate then? A. Fine."

The yard conductor, Showalter, former local chairman of the Brotherhood of Railroad Trainmen, relied on by Paynter to support the statement at page 5 of the Brief in Opposition that the switch "was in improper working order at all times," testified: that he knew nothing whatever about

the condition of the switch as to maintenance except on the night shift, 11:00 to 7:00, when it was not maintained in proper working order because it was cleaned on the first shift, 7:00 to 3:00, and not on his shift; and that he knew nothing about "whether it was clean, dirty, or otherwise at the time" of the alleged accident (J.A. 127, 132, 133). He also testified: "The switch, if kept clean, makes it much easier to manipulate and *it gives safety to the operation*" (J.A. 128, Italics supplied.).

Showalter complained about the switches in general on the second and third shifts, but definitely stated: "I cannot specify that I did about this particular switch" (J.A. 128-129). He was also unable to say that the switch in question was an "unsafe switch" (J.A. 133). He volunteered that his opinion about maintenance of the switches in general "could have been because of my [night] shift" (J.A. 137).

Showalter was also the yard conductor and former union chairman who testified concerning what Paynter admittedly did, allowed a car to be cut off to go into the number two track before making sure that the switch was properly aligned: "That isn't safe at all, no" (J.A. 135).

Paynter relies, page 6 of the Brief in Opposition, on brakeman Johnson to establish that "the switches were not cleaned daily (87)." Johnson was unable to recall whether he worked on March 19, 1968. He definitely did not know the condition of the switch on that day (J.A. 74, 86). Johnson worked the extra list and only worked "one or two or three shifts a week in this yard" (J.A. 78). His testimony on direct examination was like all the others (J.A. 78-79):

> "Q. * * *. If the switch was cleaned properly, have you had occasion to use it when it was cleaned properly; and if so, would it work as it should? [44] A. Yes, sir."

The C&O motion to strike Johnson's reply to the question whether the particular switch was cleaned daily, based on his prior testimony that he was not there but three times a week (J.A. 78), met the following response from Judge Turk (J.A. 87-88):

> "The Court: I'm not gonna strike it. I'm just gonna let the—it's up to the Jury to determine the weight of his evidence."

The quotation from Paynters' testimony at page 13 of the Brief in Opposition significantly omits the crucial next succeeding question and answer. That reply definitely establishes the total absence of any accurate knowledge by Paynter of the switch's condition when he ran over on March 19th, 1968 and grabbed to throw it in order to avoid the pending collision created by his own neglect (J.A. 160):

> "Q. And what happened? A. I had to jerk it to get it up—get the sand out of the switch, *I reckon*. It wouldn't go all the way down." (Italics supplied.)

That pure supposition is in complete accord with Paynter's own description of his sole truthful complaint about the switch during all the years in which it had caused no injury to anyone, as stated to his own counsel (J.A. 161):

> "It was in the same condition at all times. When it was full of sand, it was hard to throw."

That sole issue was without proof in this case except by speculation, conjecture and surmise—"*I reckon.*"

The number of switches and the number of men to clean them is totally irrelevant to whether this switch was cleaned on March 19, 1968, except for speculation and conjecture (Brief in Opposition, p. 14), in view of Paynter's own testimony that "Henry came over there every morning to

clean the switches" (J.A. 161). That fact was confirmed as a "daily routine" by his fellow employees called by him to testify (J.A. 147, 91, 133-134, 151, 152, 89).

It is also not true that "The C&O made no objection to the charge of the court other than the charge was heavily weighted in favor of Paynter," misstated at page 16 of the Brief in Opposition. There were in fact many objections (J.A. 236-238), the chief of which, carried also as a continuing objection throughout the trial (J.A. 74-75, 77-78, 87-88, 90-91, 216), was the refusal to confine and limit the issue and evidence to the condition of the switch at the time of the alleged accident on March 19, 1968. That important deficiency in the charge itself was definitely recognized by Judge Turk as an oversight on his part (J.A. 236). Notwithstanding that the condition of the switch on March 19, 1968 was admittedly "the sole issue in the case" (J.A. 217), the only specific reference to it in the charge was insufficiently added to the charge by the court as an admitted afterthought (J.A. 236, 64-65).

The trial court specifically did not charge the jury, as claimed at page 16 of the Brief in Opposition, that Paynter had to prove that the switch was defective at the time he was injured "and not some other time either prior to or subsequent to his injury." The trial court did the exact contrary. He expressly invited the jury to consider its condition both before and afterwards, admitted unlimited, irrelevant and immaterial testimony in that regard over a continuing objection thereto and specifically charged the jury to base its decisions on that evidence heard in the courtroom and the inferences therefrom (J.A. 74-75, 53, 54, 55).

THE NET RESULT

The Brief in Opposition further exemplifies the unsupported insinuation of fact contrary to the law and evidence that beguiled and misled the jury in this case, which the trial judge did not choose to control, and the effect of which the panel of the Fourth Circuit Court of Appeals failed to perceive. The petition for certiorari seeks the aid of this Court, as a last resort, to supervise and correct the result.

The C&O Railway was indeed entitled on the evidence, we submit, to final judgment in its favor by reason of the complete lack of proof that it failed to exercise ordinary care to provide a reasonably safe plan to work and reasonably safe equipment, the total limit of its obligation under FELA. In any event, however, a new trial on the admitted sole issue and upon evidence properly restricted to that issue is the only means by which it can otherwise obtain a fair determination whether it performed that obligation.

The result submitted to this Court proceeds from a growing tendency to construe the intention of Congress in adopting FELA, as Paynter's counsel told the jury: "We don't care. He is entitled to recovery" (J.A. 217). That trend is made possible by a combination of factors: (1) the reticence of qualified persons to serve as jurors; (2) the indisposition of trial judges to take charge of and control the trials and counsel before them; and (3) the failure of over worked appellate courts to give such perceptive study as will insure adequate comprehension of the questions presented.

The future of the administration of justice rests on a sufficient supervision by this Court of all three under the last clause of its Rule 19(b). Otherwise, we most respectfully submit, the following observation by the historian,

Theodor Mommsen, in his volume, *The History of Rome*, concerning the fall of the Republic, may also prove prophetic:

> "the blame rested jointly on all parties—magistrates, jurymen, litigants, even the public as spectators. But the most incurable wounds were inflicted by the lawyers. * * *
>
> "* * * But the sacred sense of right and the reverance for the law, which it is difficult to destroy in the minds of the multitude, is still more difficult to replace."

Respectfully submitted,

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March 11, 1975

CERTIFICATE

The undersigned certifies that three copies of the foregoing Reply, were mailed, postage prepaid, to Messrs. Willard J. Moody, and Raymond H. Strople, of Moody, McMurran and Miller, P.O. Box 1138, Portsmouth, Virginia 23705, Counsel for the Respondent, on March 11, 1975.

AUBREY R. BOWLES, JR.